was considered as stripping him of one of the essential attributes of a fee tail, namely, the right to bar the entail. See *Corbet's Case* (1598) 1 Co. Rep. 836; *Mildmay's Case* (1605) 6 Co. Rep. 40 a. Back of this was the clear policy of the courts, through which the Statute De Donis was effectually nullified by Taltarum's case (1472) 12 Edw. IV, 19, Pl. 25, encouraging the practice of barring entails. Gray, Perp., 2nd Ed., Secs. 140 et seq; Digby, Hist. Real Prop. Ch V, § 2. Accordingly, any means of forcing tenants in tail to forego this privilege was against public policy; and it is only surprising that all of the cases in Vernon were not decided like *Poole's Case*. See Gray, Restraints on Alienation, § 77. Thus it is evident that in these two classes of cases performance of the contract contravened a well defined rule of policy. But this is not true of the principal case; for, as emphasized by Warington, J., if the covenantor, actuated by dread of a law suit, should perform his covenant the result would be a simple conveyance of the land.

Finally, there is no reason to avoid the contract as obnoxious to the general policy of the law against restraints on alienation, irrespective of the Rule against Perpetuities. The legitimacy of options as a feature of commercial law is too well recognized to attack them now on that score. It is evident, moreover, that the ultimate intent of the parties to an option is not to restrain alienation, but to transfer the fee to the holder of the option. The analogy of conditions or covenants in grants of a fee made for the purpose of restraining alienation [which are held void, *In Re Rosher* (1884) L. R. 26, Ch. Div. 801; *Prey* v. *Stanley* (1895) 110 Cal. 423, whether they fall within the Rule against Perpetuities or not, *Mandelbaum* v. *McDonnell* (1874), 29 Mich. 78,] has therefore no application. Upon every theory the principal case is sound.

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REMEDIES AND MEASURE OF DAMAGES IN EMPLOYMENT CONTRACTS.—Three remedies were at one time allowed in England to a servant wrongfully discharged. 2 Smith's Lead. Cas. 41. The first was to wait until the termination of the period for which he was hired and then sue in quasi-contract for the wages constructively earned. *Gandall* v. *Pontigny* (1816) 4 Camp. 375; *Collins* v. *Price* (1828) 5 Bing. 132. This was followed by some jurisdictions in the United States, *Huntington* v. *R. R. Co.* (N. Y. 1868) 7 Am. Law Reg. n. s. 143; *Strauss* v. *Meertief* (1879) 64 Ala. 299; *Booge* v. *Pac. R. R.* (1862) 33 Mo. 212, but has now been repudiated in England, *Fewings* v. *Tisdal* (1847) 1 Exch. 295; *Goodman* v. *Pocock* (1850) 69 Eng. Com. Law. Rep. 574, and in New York. *Howard* v. *Daly* (1875) 61 N. Y. 362. The second was to "rescind" and sue immediately in quasi-contract for the wages actually earned before dismissal, and this is generally allowed at present both in England and the United States. *Archard* v. *Harner* (1828) 3 C. & P. 349; *Planchè* v. *Colburn* (1831) 8 Bing. 14; *Chicago* v. *Tilley* (1880) 103 U. S. 146; but see 7 COLUMBIA LAW REVIEW 123. The third remedy, and the one now usually employed, Smith, Master and Servant, 5th Ed., 158, was an action for breach of the express contract, the breach being not the failure to pay the stipulated wages—for they could not be said to be properly earned—but the failure to allow the servant to earn them; *Beckham* v. *Drake* (1849) 2 H. of L. Cas. 578, 603; *Emmens* v. *Elderton* (1853) 4 H. of

L. Cas. 624, 642, 667; *Howard* v. *Daly*, supra; and this action may be brought before the time set for the service to begin. *Hochster* v. *De la Tour* (1853) 2 E. & B. 678.

In most cases of a breach by B of a vital engagement of a contract, A has a right to elect either to continue or discontinue performance on his part. *Frost* v. *Knight* (1872) L. R. 7 Ex. 111; *Roper* v. *Johnson* (1873) L. R., 8 C. P. 167; *Lake Shore R. R. Co.* v. *Richards* (1894) 152 Ill. 59. Under either alternative the damages are those which would have arisen at the time set for performance, subject, however, it is said, in the case where A elects not to perform, to abatement in respect to any circumstances which may have afforded him the means of mitigating his loss. *Frost* v. *Knight*, supra; *Roper* v. *Johnson*, supra. It is a general rule of damages that A must not by wilful act or negligence increase the damages caused by B's breach. *Parson* v. *Sutton* (1876) 66 N. Y. 92; *Mather* v. *Butter Co.* (1869) 28 Ia. 254. This is simply the application in this field of the broader principle that one having a legal right cannot enlarge it by a wrongful act or failure to act, but this is radically different from the special duty suggested above, namely, to take active steps to reduce the damages due strictly under the contract. This duty can hardly be supported on strictly legal principle, as it would seem to be in conformity with the intention of the contracting parties that the one damaged should be indemnified to the extent of the profits which the contract would have yielded him, which, in the usual case, would be the difference between the market and contract prices at the time for performance. It may, however, be explained on the ground of fair dealing, which, perhaps, demands that when A can reduce B's damage without injuring himself, he should do so. But this duty is only suggested as a result of the election not to perform, and cannot be supported as a ground for compelling such election, as was held in *Tufts* v. *Lawrence* (1890) 77 Texas 526; *Tufts* v. *Weinfeld* (1894) 88 Wis. 647; *Davis* v. *Bronson* (1892) 2 N. D. 300. In cases of wrongful dismissal by B in contracts for work by A upon B's property, *Clark* v. *Marsiglia* (1845) 1 Denio 317; *Butler* v. *Butler* (1879) 77 N. Y. 472, and for personal services by A for B, *Fewings* v. *Tisdal*, supra; *Goodman* v. *Pocock*, supra, the courts seem to be uniform in refusing to allow A the right of election to continue performance. These decisions are based upon the supposed duty to reduce damages, which has been shown not to exist as a ground for compelling an election, and they can perhaps not be supported with absolute logic upon any ground. It is suggested, however, that they may all be grouped as cases where A's election to continue, if such election could be carried out without committing trespass, would in effect be enforcing upon B specific performance of his contract by compelling him to pay the full contract price.

A servant, then, upon wrongful dismissal having no right to attempt to further perform, the question remains as to the measure of damages in his action for the breach of the contract to employ. The method usually employed is to recognize the amount of the wages contracted for as *prima facie* the measure of damages, subject to diminution by the defendant upon proof that the plaintiff did or might have, obtained other employment. Sedgwick, Damages, 8th Ed. § 665; Wharton, Contracts,

§ 716; *Howard* v. *Daly*, supra. A rule, still more severe upon the defendant, was employed in a recent case in Louisiana, *Thurmond* v. *Skannal* (1907) 42 So. 577, where the court awarded damages, as of course, to the amount of the full contract wages for the whole term. Both of these methods seem to be exceptions to the general rule of contract damages. It is not made clear in any of the cases why the plaintiff is not in the first place required to prove his damages, as in other contracts, *Ridgley* v. *Mooney* (Ind. 1896) 45 N. E. 348; *Tufts* v. *Bennet* (1895) 163 Mass. 398; and why in this branch of contracts the measure of damages should not also be the difference between the market price and the contract price where there is a market price, and, where there is no market or only a market for part of the plaintiff's time, why the plaintiff should not be compelled to show this fact. As Erle, J., said in *Beckman* v. *Drake* (1849) 2 H. of L. Cas. 578, 606, there is generally a market for labor where the usual rate of wages for a given kind of labor may be proved, and the plaintiff's indemnity for the loss of his bargain in respect of his labor should be settled on the same principles as for the loss of a bargain in respect of common merchandise. It is believed that, whether a servant after dismissal works or is idle, the measure of his damages should be the difference between the market and contract price of his labor, and it would, therefore, follow that the burden of proof of the market price should be upon the plaintiff as the very basis of his claim for anything more than nominal damages, and should not be, as is now generally held, upon the defendant as part of his proof of the plaintiff's failure to perform his supposed duty of reducing damages by seeking other employment. The only duty to reduce damages which might be incumbent upon the plaintiff would be that suggested in *Frost* v. *Knight*, supra, namely, to take advantage of circumstances which might mitigate his losses, that is, which might make his damages less than the difference between the contract and market prices. The scope of that duty is not very clear; but of course it has nothing to do with the establishment of the market price itself. The principal case is, therefore, clearly wrong under the general principles of contracts; and, as to the amount of damages, it is also against the overwhelming weight of authority. Sedgwick, Damages, 8th Ed., § 665; Smith, Master and Servant, 160; *Beckman* v. *Drake*, supra; *Emmens* v. *Elderton*, supra; *Howard* v. *Daly*, supra.

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LIMITATIONS OF POWERS IN TRUST IN NEW YORK.—"There are not only a mere trust and a mere power, but there is also known to the court a power which the party to whom it is given is intrusted and required to execute." *Brown* v. *Higgs* (1803) 8 Ves. 561. The doctrine thus enunciated by Lord Eldon has proved very serviceable to the revisers of the New York system of trusts and powers; Chaplin, Express Trusts, 427 et seq.; Real Prop. Law §§ 79, 110 to 162; and the retention of powers in trust has rendered the general system of disposition of property interests more flexible. Real Prop. Law, § 79; *Downing* v. *Marshall* (1861) 23 N. Y. 366; *Reynolds* v. *Denslow* (1894) 80 Hun 359. Many principles of the common law relating to powers are embodied in the statutes, and must be resorted to for their interpretation. *Mutual Life Insurance Co.* v. *Shipman* (1890) 119 N. Y. 324, 329; *Barber* v. *Cary* (1854) 11 N. Y.